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Nos. 85-1658
85-1660

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

GROUP W CABLE, INC., *et al.*,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals For The Eleventh Circuit

MOTION TO AFFIRM

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QUESTIONS PRESENTED

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court held that a New York statute authorizing the permanent physical attachment of cable television equipment to a New York City apartment building constituted a taking *per se* of the building owner's property. The questions presented in this proceeding are:

1. Was the Eleventh Circuit correct in holding that a federal statute which authorizes the permanent physical attachment of cable television equipment to the property of a private utility company constitutes a taking of the utility company's property, for which just compensation is required?

2. If so, may Congress impose a binding rule on the Judiciary limiting the compensation that may be awarded for that taking?

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Tampa Electric Company, Alabama Power Company, Mississippi Power & Light Company, and Ar-

izona Public Service Company ("Utility Parties"),[1] hereby move for the Court to affirm the decision below of the United States Court of Appeals for the Eleventh Circuit. In support hereof, Utility Parties respectfully state as follows:

INTRODUCTION

The decision of the Eleventh Circuit below applied clear precedents of this Court in a straightforward manner to an undisputed set of facts. In finding a taking of Florida Power Corporation's property, the Eleventh Circuit reached the same conclusion as the District of Columbia Circuit in an earlier case; thus, there is no conflict among the circuits. The decision

[1] Pursuant to Sup. Ct. R. 28.1, following are the affiliates and subsidiaries of the Utility Parties: Tampa Electric Company and its following affiliates are wholly-owned subsidiaries of TECO Energy, Inc.—Tampa Bay Industrial Corporation; TECO Transport and Trade Corporation; Southern Marine Management Company; Gulf Coast Transit Company; GC Services Company Inc.; Mid-South Towing Company; Electro-Coal Transfer Corporation; TECO Coal Corporation; and Gatliff Coal Company. Intervenor Mississippi Power & Light Company has the following subsidiaries and affiliates—Arkansas Power & Light Company; Louisiana Power & Light Company; Middle South Energy, Inc.; Middle South Services, Inc.; Middle South Utilities, Inc.; New Orleans Public Service Inc.; and System Fuels, Inc. Intervenor Alabama Power Company has the following subsidiaries and affiliates—Georgia Power Company; Gulf Power Company; Mississippi Power Company; Piedmont Forest Corporation; Southern Company Services, Inc.; Southern Electric Generating Company; Southern Electric International, Inc.; and The Southern Company. Intervenor Arizona Public Service Company is a wholly-owned subsidiary of AZP Group, Inc., and has the following subsidiaries and affiliates—APS Fuels Company; APS Finance Co., N.V.; and Bixco, Inc.

below was unanimous, and no judge voted for either panel rehearing or rehearing *en banc*.

At issue in this proceeding are several thousand dollars in pole attachment fees. Both Group W and Florida Power, the principal parties in interest, have assets well in excess of a billion dollars. The Utility Parties in no way intend to disparage the importance of this proceeding, either to the cable companies involved or to any other party. At the same time, however, this does not appear to be a case of "peculiar gravity and general importance," *American Construction Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 383 (1893), nor is it a matter "affecting the interests of this nation in its internal and external relations," *Forsyth v. City of Hammond*, 166 U.S. 506, 515 (1897).

The decision of the court of appeals below was a model of careful and thoughtful judicial analysis. The Utility Parties submit that review should be denied and the decision below affirmed.

COUNTERSTATEMENT OF THE CASE

A. The FCC's Arbitrary Regulation of Pole Attachments

As recounted by the court below, since the advent of cable television in the 1950s, most cable companies have constructed their distribution systems by attaching their equipment to the distribution poles owned by telephone and electric utilities. The attachments are made pursuant to contracts between the pole owner and the cable company, and usually specify a small annual fee to be paid to the pole owner.

In 1978, Congress enacted legislation providing the Federal Communications Commission with jurisdiction

to regulate the rates that pole owners may charge to cable companies. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35-36 (codified as amended at 47 U.S.C. § 224 (West Supp. 1985)) ("Pole Attachment Act"). Congress directed the FCC to set "just and reasonable" rates, and established a binding formula for the FCC to use in determining the rates that may be charged for pole attachments. Pursuant to that formula, the FCC has ruled that on a typical utility pole, cable companies may be charged no more than one-thirteenth of the proven costs of owning and maintaining the pole. *Second Report and Order in CC Docket 78-144*, 72 F.C.C. 2d 59 (1979). The FCC also ruled that Congress intended the Act to be interpreted in such a way as to promote the economic growth of the cable industry, rather than simply to provide for the neutral determination of costs, as in most other regulatory statutes. *Id.* at 74.[2]

Regrettably, the Commission's enforcement of the Act has been one-sided and discriminatory. The FCC's Common Carrier Bureau, for example, has enforced its procedural rules with exacting strictness against utilities, while overlooking defects in pleadings submitted by cable companies. *Compare Caddo-Cable Communications Corp. v. Southwestern Electric Power*

[2] The cable interests contend, and the Act is premised upon the notion, that cable operators have no alternative but to attach their equipment to utilities' property. However, it is quite feasible to place cable facilities underground instead. In point of fact, both utilities and cable operators increasingly are forced to bury their facilities because of community opposition to above-ground lines. *Cf.* S. Rep. No. 580, 95th Cong., 1st Sess. at 18 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 109, at 126.

Corp., Mimeo No. 2430 (released Feb. 15, 1984) (rejecting pleading filed two days late by utility), *and Liberty TV Cable, Inc. v. Georgia Power Co.*, Mimeo No. 1842 (released Jan. 29, 1982) (refusing extension of time requested by utility to complete cost study), *with RVS Cablevision Corp. v. Southwestern Electric Power Co.*, Mimeo No. 2718 (released March 12, 1982) (waiving failure by cable company to meet service requirements); *Teleprompter Corp. v. Montana Power Co.*, Mimeo No. 000737 (released May 8, 1981) (waiving two procedural defects in complaint of cable operator), *and Teleprompter of Fairmont, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia*, 85 F.C.C. 2d 293 (1981) (waiving defects in cable operator's complaint, but refusing to consider new evidence submitted by telephone company).

Similarly, the FCC has taken a myopic view of utility costs, tilting its rate calculations in favor of producing lower rates than would be produced by an even-handed analysis. For example, the FCC permitted utilities to charge cable operators for their share of the cost of a pole, but not for their share of the cost of the land on which it sits, even when the utility was forced to purchase the land right. *Williamsburg Cablevision v. Carolina Power & Light Co.*, Mimeo No. 1961 (released Jan. 26, 1983). The FCC permitted utilities to include administrative and general salaries in their rates, but not the cost of corresponding employee pensions and benefits, even though the expense to a utility of money paid to an employee directly in a salary and money set aside in a pension fund are the same. *Teleprompter Corp. v. Florida Power & Light Co.*, 54 Rad. Reg. 2d (P&F) 1391 (1983).[3] The

[3] The FCC even went so far as to rule that telephone com-

FCC often has refused to process cases filed by utilities, allowing them to languish for years in the Commission's files, but expedites matters filed by the cable companies.[4]

All of this led the D.C. Circuit, in a recent appeal of an FCC pole attachment order, to hold that "the Commission's somewhat casual calculation[s]," reflect "the sort of 'clear error[s] of judgment' . . . and absence of 'rational connection[s] between facts found and the choice[s] made' as to render them arbitrary and capricious," *Alabama Power Co. v. FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985), quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962). Likewise, the Fifth Circuit recently held that the rate formula established by the FCC is "inconsistent, arbitrary and essentially unworkable." *Texas Power & Light Co. v. FCC*, 784 F.2d 1265, 1275 (5th Cir. 1986).

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panies, long subject to its jurisdiction, may recover their expenses relating to property insurance, but that electric utilities could not. *Cf.* Teleprompter Corp. v. Southern Bell Tel. & Tel. Co., Mimeo No. 1315 (released Dec. 16, 1983) (allowing telephone company to recover property insurance expense), with Teleprompter Corp. v. Alabama Power Co., Mimeo No. 33976 (released Nov. 3, 1983) (disallowing electric utility recovery of property insurance expense). As a result of the FCC's gerrymandering of the statutory rate formula, pole attachment rates were often reduced 80-90% from the pre-existing, contractually agreed-upon level. *E.g.*, Tele-Communications, Inc. v. Mountain States Tel. & Tel. Co., Mimeo No. 1948 (released Dec. 27, 1983) (80% reduction when rate lowered from $4.00 to $0.83).

[4] In this case, for example, the FCC ruled on Teleprompter's complaint within eight months of when it was filed, but refused to process Florida Power's application for review for three years.

B. The Federal Communications Commission's Mishandling of the Case Below

The FCC's handling of the case below was of a piece with its arbitrary handling of other pole attachment cases. Teleprompter Corp. and several other cable firms filed complaints at the FCC in 1980 and 1981, asking the FCC to abrogate their pole attachment contracts and substitute lower rates for the rates they had agreed to in their contracts with Florida Power. Florida Power responded by demonstrating that its rates were fully justified under the Act, and pointing out that the relief requested by the cable operators would violate constitutional prescriptions against the taking of private property for public use without just compensation.

The FCC's Common Carrier Bureau granted the cable operators' request in full, and in fact, lowered the rates even further than the cable operators had requested.[5] Although the cable operators had not objected to paying the maintenance expenses established by Florida Power, the FCC on its own disallowed the majority of this expense. The Common Carrier Bureau disallowed more than half of the administrative expenses documented by Florida Power, and permitted only four limited categories of expense to be recovered, a methodology later held to be arbitrary and capricious by the District of Columbia Circuit. *Alabama Power Co. v. FCC*, 773 F.2d at 370. The Bureau permitted Florida Power to recover less than one-

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[5] In dozens of cases, including all of the complaint cases that have been reviewed by the appellate courts, the FCC reduced the rates of the utility even lower than the cable operators had requested.

third of its tax expenses, a policy rejected by the courts in both *Alabama Power Co.*, 773 F.2d at 371, and *Texas Power & Light Co.*, 784 F.2d at 1272. Finally, the Bureau completely ignored Florida Power's constitutional arguments.

Florida Power filed a timely application for administrative review, requesting the full Commission to reverse the Common Carrier Bureau's ruling, and pointing out glaring errors in the Bureau's rate computation. Rather than ruling on Florida Power's appeal, however, the FCC staff refused to process the application, as it had delayed many other such applications. 1981 passed. 1982 passed. 1983 passed. Finally, late in 1984, the Commission issued a brief decision rejecting all of Florida Power's rate and constitutional arguments, and summarily affirming the Common Carrier Bureau's earlier actions.

C. The Decision of the Court of Appeals

On appeal, the Eleventh Circuit agreed with Florida Power and vacated the FCC's order. The court of appeals applied the recent decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and found, as had the District of Columbia Circuit in *Alabama Power Co. v. FCC*, 773 F.2d at 367 n.8, that the FCC order authorizing the permanent physical occupation of Florida Power's property for less than one-third of the rate agreed to by Teleprompter Corp. (and its successor-in-interest, Group W Cable, Inc.) constituted a taking of Florida Power's property. Having found a taking, the court of appeals went on to hold that the procedures established under the Pole Attachment Act were inadequate to ensure that Florida Power will receive just compensation as required by the fifth amendment. The court held that the key constitutional principle of separation of powers precludes Congress from prescribing a binding rule for the determination of just compensation, which, the court held, is a judicial function. Since the Pole Attachment Act prescribes just such a binding rule, the court held that the Act was constitutionally inadequate, and vacated the FCC's order. For this point, the Eleventh Circuit relied upon cases dating as far back as *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), as well as more recent precedents.

The cable companies raise the specter that the Eleventh Circuit's decision will overburden the federal courts with determinations of just compensation arising from the regulatory decisions of administrative agencies. Group W Statement at 27; Texas Cable Statement at 9. This alleged threat to the judiciary's caseload, however, is based on the cable interests' erroneous theories that the Act is merely economic regulation rather than a taking and that the Eleventh Circuit's decision denies administrative agencies any role in the establishment of just compensation. Since neither of these theories is correct, the allegations of the cable companies are wide of the mark.

The Utility Parties submit that each point of the Eleventh Circuit's analysis is correct and well grounded in the decisions of this Court.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE LORETTO DOCTRINE TO THE FACTS OF THIS CASE.

The fifth amendment to the United States Constitution prohibits the taking of private property for

public use without the payment of just compensation. For many years, the courts have struggled to determine when a governmental interference with property rights will constitute a "taking." In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court provided guidance as to when a taking will be found.

The issue in *Loretto*, as stated by Justice Marshall, was "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which compensation is due under the Fifth and Fourteenth Amendments of the Constitution." 458 U.S. at 421. This Court answered that question in the affirmative.

Loretto involved a New York statute that prohibited landlords from interfering with the installation of cable television facilities on their premises, as well as prohibiting them from charging cable operators more than a one-time fee of $1.00 for the right to occupy their property. 458 U.S. at 424. The New York Court of Appeals upheld the statute as a legitimate exercise of the police power. *Id.* This Court reversed on the grounds that application of the statute effected a taking. *Id.* at 426.[6]

The rule established in *Loretto* is refreshingly simple: a permanent physical occupation authorized by

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[6] Historically, this Court has taken a much stricter view of physical invasions of property than of nonpossessory regulations on use. In *Loretto*, as in this case, a physical invasion of property was at issue. Most of the cases cited by the cable interests as somehow being inconsistent with the Eleventh Circuit's decision do not involve compelled physical invasions, and thus are easily distinguishable. *See Loretto*, 458 U.S. at 440 n.19.

the government is a taking *per se*. *Id.* at 434-35. Application of that standard to the facts of this case leads inescapably to the conclusion that Florida Power's property has been taken in the same manner and to the same degree as was the New York landlord's property in *Loretto*.

The equipment Teleprompter (and later Group W Cable) attached to Florida Power's poles, as the court of appeals noted, is "virtually indistinguishable" from the equipment it attached to Mrs. Loretto's apartment house in New York. 772 F.2d at 1544. There can be no dispute that the equipment physically occupies Florida Power's distribution poles.

It is also clear that these attachments are neither temporary, nor invited at the reduced rates mandated by the FCC. Many utilities have had cable attachments on their poles continuously since the 1950s—a period of some 30 years. Moreover, the attachments have been authorized or compelled by the government on numerous occasions. In several cases, the FCC has ruled that utilities may not refuse to permit cable operators to occupy space on their poles, and in one case ruled that a utility must expand its facilities to make room for additional new cable attachments.[7]

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[7] Group W, in an attempt to distinguish *Loretto*, asserts that because Florida Power is subject to regulation as an electric utility it is not entitled to fifth amendment protection with regard to the physical occupation of its property by cable companies. Of course, this overlooks the fact that Mrs. Loretto's apartment house was dedicated to the New York housing market and subject to New York City's rent control law. This Court found no diminution of her constitutional rights, however. Group W is essentially trying to create a "utility exception" to the fifth amendment, a theory that must be firmly rejected. This

For example, utilities and cable operators at times have become embroiled in disputes over such items as late payment (and non-payment) of rentals, unsafe attachments not in compliance with safety code requirements, the making of unauthorized attachments, and so on. In each of these cases, the FCC has issued orders preventing the utilities involved from terminating service to the cable operators, even where the cable operator had violated the pole attachment agreement or where a termination provision was lawfully invoked. *E.g., Whitney Cablevision v. Southern Indiana Gas & Electric Co.*, Mimeo No. 841 (released Nov. 16, 1984); *Tele-Communications, Inc. v. South Carolina Electric & Gas Co.*, Mimeo No. 5957 (released Aug. 16, 1983). The cable interests fail to cite even a single instance in which a utility was permitted by the FCC to refuse to allow a cable operator to continue to occupy space on its poles. Clearly, the FCC's rules and decisions authorize the cable operators to occupy utility poles for a sufficient duration that they meet the *Loretto* decision's test of permanency, rather than being merely temporary or intermittent.[8]

Court recently rejected the notion that utilities were somehow not entitled to the full constitutional protections accorded other parties. Pacific Gas and Elec. Co. v. Public Util's Comm'n of California, 106 S.Ct. 903 (1986). *See also* Consolidated Edison Co. of New York v. Public Serv. Comm'n of New York, 447 U.S. 530 (1981). There is no need for a replay of those cases now.

[8] The government suggests that the case may not be ripe for review because Florida Power has not yet attempted to physically remove Teleprompter's equipment. Such a move would clearly be futile in light of the FCC's numerous rulings prohibiting utilities from doing precisely that. Furthermore, the government's argument is inconsistent with this Court's holding in Northern

In another case, *David Bailey d/b/a Port Gibson Cable TV v. Mississippi Power & Light Co.*, Mimeo No. 36118 (released Sept. 11, 1985), a utility was asked by a cable operator to replace approximately 50% of its poles in a small town in Mississippi in order to accommodate an additional cable operator. The utility protested that the cost would be prohibitive, that its personnel were unavailable, and that the community was already served by one cable television operator. The FCC held that the utility must expand its facilities and permit the additional cable company to attach. *Id.* at para. 14. *Port Gibson* flatly contradicts any assertion that cable attachments are simply a matter of invited access. Mississippi Power & Light Company is under direct order by the FCC to permit the occupation of its poles by Port Gibson Cable TV, even on poles where no other cable attachment exists. This can hardly qualify as a case of invited access.[9]

The court of appeals also properly recognized that Florida Power's invitation to Teleprompter to occupy

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Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There, this Court held that bankruptcy judges who are appointed for fixed terms, could be removed for cause, and who could suffer salary diminution, could not constitutionally exercise certain powers granted them in the Bankruptcy Act of 1978. The Court rejected the argument that the case was not ripe for decision because no removal or diminution had been attempted.

[9] The cable interests' assertions are also inconsistent with the arguments they advanced earlier this Term in Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1984), *cert. granted*, 54 U.S.L.W. 3328 (argued April 29, 1986), that the number of cable operators allowed on a utility's poles may not be limited, at least by the government.

its poles at one price does not imply an invitation to occupy its poles at a small fraction of that price established by the FCC. 772 F.2d at 1543. It is a matter of elementary law that a property owner's consent for a stranger to enter his property subject to a condition does not imply consent if the condition is not met. Restatement (Second) Torts § 168 (1965).

Several cable operators suggest that Florida Power suffered no loss when its pole attachment rates were reduced by two-thirds pursuant to the FCC's rate formula, because it allegedly could make up the difference by increasing the rates to its electric ratepayers. Such a suggestion is as poorly conceived in policy as it is erroneous in fact. As the Fifth Circuit recognized in *Texas Power & Light Co.*, it is unreasonable to permit cable operators to escape payment for their share of pole costs by thrusting those costs on the general body of ratepayers. 784 F.2d at 1272. Furthermore, it is untrue that all pole costs not borne by the cable operators are necessarily picked up by electric ratepayers. Many utilities go for years without filing general rate cases. If their rates are premised on receiving a certain amount of revenue from cable operators and that amount is slashed by the FCC, only the utilities lose until their rates are readjusted.[10] Finally, even if the state utility commissions

[10] The cable interests grossly misconstrue the nature of utility ratemaking when they assert that utilities are guaranteed to receive their rate of return. At best, utilities are assured of the opportunity to earn their rate of return, which they may or may not achieve, but they are not assured of receiving anything. The cable interests depict a 19th century view of utility regulation, in which there is a complete monopoly by the utility. This view is inconsistent with the pro-competitive and deregulatory policies

generally did permit the recovery of the shortfall from state ratepayers, the cable operators have cited no proposition of law that would require them to continue the practice.

The court of appeals broke no new ground in finding a taking of Florida Power's property; rather, its decision rests firmly on established precedent of this Court. This conclusion is so clear that this appeal must be seen for what it is—an unjustified request for this Court to revisit *Loretto* by one of the parties to that case. The Court should not entertain that request so soon after issuance of the *Loretto* decision. The Eleventh Circuit carefully and properly reached its conclusion that the permanent physical occupation of Florida Power's utility poles by Teleprompter constitutes a taking of that utility's property.

II. THE POLE ATTACHMENT ACT IS UNCONSTITUTIONAL BECAUSE IT DIRECTS THE FCC TO SET RATES ACCORDING TO A BINDING CONGRESSIONAL FORMULA AND THEREBY FORECLOSES ANY JUDICIAL DETERMINATION OF JUST COMPENSATION.

The Eleventh Circuit correctly found that, in directing the FCC to set pole attachment rates according to a binding formula mandated by Congress, the Act allows Congress to take property and to determine the compensation for that taking. The court recognized that the FCC establishes the pole attachment rates that a utility may charge pursuant to the formula specified by Congress in Section (d)(1) of the

favored by most states, and most electric companies now face competition in their service areas for at least some services. In this environment, their returns are anything but guaranteed.

Act, and concluded that "[b]y prescribing a binding rule in regard to the ascertainment of just compensation Congress has usurped what has long been held an exclusive judicial function." 772 F.2d at 1546. Since ratemaking by the FCC according to this "binding rule" does not provide any opportunity for a judicial determination of just compensation for the *per se* taking of the private property of utilities effected by the FCC's rate orders, the Eleventh Circuit properly ruled that the Act suffers from a fatal constitutional defect. 772 F.2d at 1546.

The government and the cable companies attempt to avoid the weight of the precedent for this holding by setting up the strawman argument that the Eleventh Circuit foreclosed participation by the FCC or any administrative agency in the process of establishing just compensation. Government Statement at 13-14; Group W Statement at 21-24. With all due respect, that is not what the court held. A fair reading of the opinion, in light of the cases relied upon by the court, establishes that the government and the cable companies have ignored the central element of the court's actual holding. The Eleventh Circuit found that the FCC's regulation of pole attachment rates *pursuant to a binding rule established by Congress* offends the Constitution by imposing a legislative limit on just compensation, which must be determined ultimately by the judiciary. Thus, properly viewed, the decision of the Eleventh Circuit is in full accordance with the established case law, and the shrill warnings by the government and the cable companies of the decision's dire consequences for the system of administrative regulation ring hollow.

A. A Legislative Limit on Just Compensation Violates the Constitutional Separation of Powers.

The decision of the Eleventh Circuit rests securely on the principle established by precedent that an act of Congress transgresses the Constitution if it limits the scope of the inquiry into the appropriate measure of just compensation for a taking of private property, an issue which the Constitution entrusts to the judiciary for ultimate determination. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 and 77-78 (1936); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 364-65 (1936); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980); *American-Hawaiian Steamship Co. v. United States*, 124 F.Supp. 378, 382-83 (Ct. Cl. 1954), *cert. denied*, 350 U.S. 863 (1955); *Hudson Navigation Co. v. United States*, 57 Ct. Cl. 411, 415 (1922). Even the government has admitted the continuing force of case law holding that "Congress cannot circumscribe the ultimate judicial determination of whether the compensation provided is constitutionally adequate by prescribing statutory limits on the amount to be paid." Government Statement at 14 n.15. The FCC's establishment of cable attachment rates under the binding rule in the Act imposes just such a statutory limit on the compensation to the utilities, and, as the Eleventh Circuit correctly held, cannot survive scrutiny under the very constitutional standard conceded by the government.

This Court, in the seminal *Monongahela Navigation Co.* case, explained the basic constitutional defect of a statutory limit on just compensation:

> By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character, but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 327. A Congressional restriction on the measure of just compensation offends the principle of separation of powers which lies "at the heart of the Constitution," *Buckley v. Valeo*, 424 U.S. 1, 119 (1976). The division of responsibilities among the branches of government served a vital purpose in the view of the Framers of the Constitution:

> When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner. . . .
>
> The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.

The Federalist No. 47, at 303, 324 (J. Madison) (J. Cooke ed. 1961) (emphasis in original). For these reasons, "the Constitution diffuses power the better to secure liberty," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), thereby furnishing "a vital check against tyranny," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). The doctrine of separation of powers, which was so significant to the founders of our system of government, and which underlies the prohibition in *Monongahela Navigation Co.* against statutory limitation of just compensation, remains central to the "very structure" of our Constitution today. *INS v. Chadha*, 462 U.S. 919, 946 (1983).

The Eleventh Circuit quite properly invalidated the FCC's pole attachment ratemaking under the statutory formula as inconsistent with the constitutionally mandated division of responsibility for the taking of private property and the award of just compensation for that taking. As the government concedes in this case, Congress cannot both take property and "constitute itself the judge in its own case" by setting a statutory limit on just compensation. Government Statement at 15 n.15, quoting *Isom v. Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858).

B. The Opportunity for Limited Judicial Review of FCC Rate Orders Does Not Correct the Constitutional Infirmity of the Act.

In addition to their jeremiads about the implications of the Eleventh Circuit's decision for administrative regulation, the government and the cable interests claim that the Act satisfies the constitutional requirement for an ultimate judicial determination of just compensation based on the availability of appellate

review of FCC rate orders. Government Statement at 14-15; Group W Statement at 26-27. Judicial review of the FCC's pole attachment rate decisions is limited to an administrative record containing only evidence related to the elements of a statutory formula, which does not even purport to establish just compensation. Appellate review of such a narrowly constricted record fails to permit the judicial inquiry into just compensation mandated by the Constitution.

Just compensation for the governmentally authorized taking of private property is a constitutional right, and the ultimate determination of what compensation is just is reserved to the judiciary. *Monongahela Navigation Co. v. United States*, 148 U.S. at 327. This Court has held that the Congressional delegation to an entity other than an Article III court of an adjudicative function reserved to the federal judiciary is not validated by the mere existence of "some degree of appellate review." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.9 (1982). Article III requires the judiciary to retain the authority "to make an informed, final determination" of all constitutional issues. *United States v. Raddatz*, 447 U.S. 667, 682 (1980), quoting *Mathews v. Weber*, 423 U.S. 261, 271 (1976). A court can discharge its responsibility to render ultimate adjudication of a constitutional right only if it has access to all relevant facts. *Id.* A court of appeals reviewing an FCC pole attachment rate order is denied the evidence necessary to exercise its ultimate Article III authority and responsibility since the administrative record does not provide a sufficient basis to determine just compensation and the court cannot engage in fact-finding outside that record.

Appellate review of FCC pole attachment rate orders under the Administrative Procedure Act (5 U.S.C. § 706) is limited to consideration of the record developed before the Commission. "The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co. v. Lorion*, 105 S.Ct. 1598, 1607 (1985).

The administrative record in pole attachment proceedings contains only evidence which the FCC deems relevant to its application of the "binding rule" in the Act. The ratemaking formula in the Act thus binds the reviewing court, which has no authority to conduct a *de novo* evidentiary proceeding to develop information on the elements of just compensation.

The FCC's record in pole attachment rate proceedings does not provide a reviewing court with sufficient evidence to determine just compensation. The statutory rate formula applied by the FCC does not even refer to just compensation, but to a "just and reasonable" rate for cable attachments.[11] 47 U.S.C. §§ 224(b) and (d). The binding statutory rule specifies that a "just and reasonable" rate:

> assures a utility the recovery of not less than the additional costs of providing pole attach-

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[11] The government mistakenly suggests that the FCC attempts to set just compensation. In the hundreds of pole attachment decisions issued by the FCC, not once has the Commission suggested that it is attempting to set just compensation in accordance with the numerous precedents and judicial decisions bearing on that determination; rather, the focus of the Commission's inquiry is narrower, and is directed solely at applying the binding rule mandated by Congress in the Act.

> ments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d). The binding rule applied by the FCC to establish the maximum rate reduces to the following formula:

$$\text{Maximum Rate} = \frac{1 \text{ foot}}{13.5 \text{ feet}} \times \text{Operating Expenses} + \text{Capital Costs of Poles}$$

Even in the face of direct physical evidence that cable attachments occupy more than one foot of usable space, the FCC has held repeatedly that it is bound under the Act to allocate only one foot of usable space to pole attachments. *E.g., Capital Cities Cable, Inc. v. Arizona Public Service Co.*, Mimeo No. 5059 (released June 29, 1984).

The government attempts to equate pole attachment rates based on the statutory formula with just compensation. Government Statement at 12. The cases cited by the government, however, do not address the proper measure of just compensation for a taking of private property under the fifth amendment. Furthermore, the government has overlooked numerous other cases, cited below, approving and applying other measures for determining just compensation that are ignored in the ratemaking process under the Pole Attachment Act.

The legislative rule for the establishment of "just and reasonable" pole attachment rates based on the arbitrary allocation of selected costs ignores other factors which may be relevant to the determination of just compensation, such as fair market value. *See Kirby Forest Industries v. United States*, 104 S.Ct. 2187, 2191 n.14 (1984); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 126 (1950); *United States v. Miller*, 317 U.S. 369, 374 (1943); *United States v. 320.0 Acres of Land, More or Less, in County of Monroe, State of Florida*, 605 F.2d 762, 781 (5th Cir. 1979); *United States v. 15.3 Acres of Land, Etc.*, 154 F.Supp. 770-78 (M.D. Pa. 1957). However, the FCC restrict the evidence in pole attachment rate cases to the elements of the statutory formula. Judicial review on the basis of such a truncated record is merely an assessment of the FCC's compliance with the Congressional formula, and perpetuates the Act's constitutional defect of circumscribing the ultimate judicial determination of just compensation.[12]

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[12] The cable interests suggest that the Act is constitutional, notwithstanding the inadequacy of judicial review of an administrative record limited to the statutory formula, on the basis of the alleged ability of utilities to obtain just compensation from the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1982). Group W Statement at 24 n.50. Notably, the government declined to support the Act's constitutionality by reference to the Tucker Act. Government Statement at 15 n.16. The reliance of the cable companies on the Tucker Act is misplaced.

The structure of the Pole Attachment Act and its legislative history require the inference that Congress withdrew Tucker Act jurisdiction with respect to pole attachment rates. The Pole Attachment Act broadly specifies that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable . . . ." 47

CONCLUSION

"[I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another,

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U.S.C. § 224(b)(1). The only exception to the FCC's regulatory authority over pole attachment rates is "where such matters are regulated by a State." 47 U.S.C. § 224(c)(1). The following statement in the legislative history regarding the structure of the Act confirms that Congress intended the FCC to occupy the entire field of pole attachment rate regulation:

> The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties.

S.Rep. No. 580, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 109, 123.

It must be concluded that Congress intended to withdraw Tucker Act jurisdiction over pole attachment rates as inconsistent with the structure and purposes of the Pole Attachment Act.

Furthermore, since the FCC's approach to setting pole attachment rates is based upon an allocation of costs which change over time, the rate established may vary significantly from year to year. Accordingly, the amount that the utility would be entitled to recover under the Tucker Act would similarly vary from year to year. To hold that utilities must resort to the Tucker Act for just compensation would result in an annual ritual whereby the utility would first go to the FCC for a determination of its statutory rights for that year, then (several years later, after exhausting agency and judicial review of the Common Carrier Bureau's decision) go to the Claims Court for its constitutional entitlement for that year. Nor could this process be avoided by the award of a one-time fee as compensation for the taking for all future years. Because CATV operators are constantly attaching to new poles as they expand their systems, utilities would be forced periodically to trek to the FCC and the Claims Court for determinations of their statutory and constitutional entitlements for the newly taken pole space. Such a procedure is a plainly inadequate remedy in light of the relatively small amounts of money involved for any given CATV system in any particular year and would amount to a deprivation of due process.

it is that which separates the Legislative, Executive, and Judicial powers." 1 Annals of Cong. 581-82 (J. Gales ed. 1789) (J. Madison). Pursuant to that principle, the Eleventh Circuit correctly determined that the fifth amendment does not allow for the determination of just compensation pursuant to a "binding rule" established by Congress. Judicial review of the administrative record limited to evidence relevant to the "binding rule" does not remedy the constitutional deficiency of such a legislatively controlled award of compensation. The Eleventh Circuit correctly ruled that the Pole Attachment Act fails to provide a constitutionally adequate means for determining just compensation.

WHEREFORE, for the foregoing reasons, the Utility Parties respectfully request that the decision below of the Eleventh Circuit be affirmed.

Respectfully submitted,

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